Supreme Court, U.S.
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No. 98-700

In The

Supreme Court of the United States

October Term, 1998

GRAND RIVER DAM AUTHORITY and RONALD COKER, in his official capacity as General Manager and Chief Executive Officer of the Grand River Dam Authority,

Petitioners,

vs.

JACK DALRYMPLE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's decision that it lacks subject matter jurisdiction, and therefore remand was necessary, is nonreviewable pursuant to 28 U.S.C. § 1447(d)?

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STATEMENT OF THE CASE

The *Dalrymple* plaintiffs have brought a class action against GRDA for the increased elevation and duration of flooding on the Neosho River caused by Pensacola Dam and its operation. Plaintiffs filed the action in Oklahoma state court on September 23, 1994, pleading state causes of action against a state entity. (Doc. 1, Ex. "F"). The District Court in and for Ottawa County, State of Oklahoma is a court of competition jurisdiction and the Oklahoma Supreme Court has already ruled that venue is proper in Ottawa County.

On October 14, 1994, GRDA removed the case to the United States District Court for the Northern District of Oklahoma, Case No. 94-C-970. (*Id.*) In its notice of removal, GRDA raised 28 U.S.C. §§ 1441 and 1442(a)(1). (*Id.* at 6-7).

Plaintiffs filed a motion to remand on November 9, 1994, wherein they requested

> that the Court enter an order pursuant to 28 U.S.C. § 1447(c) remanding this case to the District Court for Ottawa County, Oklahoma, for the reason that subject matter jurisdiction is not proper in the United States District Court for the Northern District of Oklahoma.

(Doc. 4 at 1).

On April 2, 1996, the court in the Northern District of Oklahoma issued two separate orders in which it: (1) remanded the action by plaintiffs against GRDA; and (2) dismissed FERC and the Corps from GRDA's third party action. (Docs. 114, 115).

The clerk of the district court for the Northern District of Oklahoma sent the order of remand to the clerk of the district

court for Ottawa County, Oklahoma on April 3, 1996. The order was received and filed on April 8, 1996.

In the order remanding plaintiffs' case to state court, the district court addressed both 28 U.S.C. §§ 1441 and 1442. While not specifically citing 28 U.S.C. § 1447, the court specifically held: (1) "The Court does not have jurisdiction pursuant to 28 U.S.C. § 1442(a)(1)"; and (2) "There is no basis for removal under § 1441(b)." (Petitioner's App. 23-24). The district court then granted plaintiffs' motion to remand, which did specifically request relief under 28 U.S.C. § 1447(c). (*Id.* 24).

On May 2, 1996, GRDA filed the Tenth Circuit notice of appeal from the order "remanding the case back to state court entered on April 2, 1996; and the Orders denying reconsideration entered on April 11, 1996." (Doc. 121).

In an order dated May 28, 1998, the Tenth Circuit stated: "Accordingly, we cannot see how the district court's remand order could be characterized as based on anything but a lack of subject matter jurisdiction as contemplated by § 1447". (Petitioner's App. 10-11).

Therefore, the issue is simply whether Judge Holmes remanded the action to state court based on lack of jurisdiction, thus making the order nonreviewable pursuant to 28 U.S.C. § 1447(d).

Plaintiffs must also address a blatant misstatement of the record. Plaintiffs have never attempted "to enjoin the continued operation of the dam for flood control purposes". (Petitioner's Brief, 2). The injunction claim goes to the possible effect of the Oklahoma Governmental Tort Claims Act and seeks an affirmative injunction requiring GRDA to purchase additional easements if plaintiffs' would be continually barred from a complete recovery

by the damage caps established by the Oklahoma Governmental Tort Claims Act.

Plaintiffs' have never asserted or asked a state court judge to establish rules of operation for Pensacola Dam. This is simply another attempt of GRDA to characterize the claims against it as federal claims raising federal questions creating federal jurisdiction, which they are not.

Despite the efforts of GRDA to complicate this matter, the question presented is simple and straight forward: Is a matter remanded for lack of subject matter jurisdiction appealable? This court has already addressed the question and done so as recently as 1996. The petition should be denied.

ARGUMENT

The issue presented in this matter is simply whether 28 U.S.C. § 1447(d) applies when plaintiffs have asked for remand pursuant to 28 U.S.C. § 1447(c) and the district court has held: (1) "The Court does not have jurisdiction pursuant to 28 U.S.C. § 1442(a)(1);" and (2) "There is no basis for removal under § 1441(b)." (Petitioner's App. 23-24).

Pursuant to 28 U.S.C. § 1447(c): "If at anytime before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *Id.*

Pursuant to 28 U.S.C. § 1447(d):

> An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to

> section 1443 [civil rights] of this title shall be reviewable by appeal or otherwise.

Id.

The order of remand was entered by the federal clerk, and then mailed and received by the clerk of the state court, thus concluding the federal courts' jurisdiction.

In *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996), this Court most recently summarized the exceptions to the nonappealability of a remand order. Therein, this Court stated:

> As we held in *Thermtron Products, Inc. v. Hermansdorfer, supra*, at 345-346, 96 S. Ct., at 590, and reiterated this Term in *Things Remembered, Inc. v. Petrarca*, 516 U.S. [124], ____, 116 S. Ct. 494, 495, 133 L. Ed. 2d 461 (1995), "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." This gloss renders § 1447(d) inapplicable here: The District Court's abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedures.

116 S. Ct. at 1718.

In *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 116 S. Ct. 494, 133 L. Ed. 2d 461 (1995), this Court expanded on one of the two grounds established in § 1447(c). That case involved an untimely notice of removal, which was a defect in removal procedures. This Court explained:

> As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).
>
> Section 1447(d) bars appellate review of the remand order in this case. As noted, § 1447(d) precludes appellate review of any order "remanding a case to the State court from which it was removed." The parties do not dispute that the District Court's order remanded this case to the Ohio state court from which it came. There is also no dispute that the District Court remanded this case on grounds of untimely removal, precisely the type of removal defect contemplated by § 1447(c) . . .
>
> * * *
>
> If an order remands a bankruptcy case to state court because of a timely raised defect in removal procedure of lack or subject-matter jurisdiction, then a court of appeals lacks jurisdiction to review that order under § 1447(d), regardless of whether the case was removed under §§ 1441(a) or 1452(a). The remand at issue falls squarely within § 1447(d), and the order is not reviewable on appeal.

116 S. Ct. at 497.

Quakenbush and Things Remembered are two very recent statements by this Court which strongly support that an order remanding a case to state court under the circumstances in *Dalrymple* is clearly a nonreviewable order.

Courts and legal commentators have recognized the impact of § 1447(d) for years. As stated in 14A Wright, Miller and Cooper, Federal Practice and Procedure § 3739 (1985):

> An order of remand ends the jurisdiction of the federal court. The court is required to mail a certified copy of the order to the clerk of the state court, and upon the state courts receipt of this copy, the federal court is without power to vacate the order to remand, even if it is persuaded the order was erroneous.

Id. at 588-89. *See Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915-16 (9th Cir. 1992); *Hunt v. Acromed Corp.*, 961 F.2d 1079, 1081 (3rd Cir. 1992); *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115-16 (4th Cir.), *cert. denied*, 445 U.S. 911, 100 S. Ct. 1090, 63 L. Ed. 2d 327 (1979); *Federal Deposit Ins. Corp. v. Santiago Plaza*, 598 F.2d 634, 636 (1st Cir. 1979); *In re LaProvidencia Dev. Corp.*, 406 F.2d 251, 252 (1st Cir. 1969); 1A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice, Removal ¶ 0.169 [2.1], pp. 688-70 (2d ed. 1996).

Sometime ago, in *Midland Mortgage Co. v. Winner*, 532 F.2d 1342 (10th Cir. 1976), the Tenth Circuit discussed the general principles of appellate review:

> We are convinced that the Court was clearly remanding the suit on grounds specified in 28 U.S.C. § 1447(c), namely that under the removal statues the case "was removed improvidently and without jurisdiction," as the removal statute says. This being so, the order of remand "is not reviewable on appeal or otherwise. . . ." 28 U.S.C. § 1447(d). While a narrow exception for review on mandamus was recently recognized in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46

L. Ed. 2d 542, 44 USLW 4085, that opinion makes it clear to us that we have no jurisdiction to review the order of remand in this mandamus proceeding. We feel the Court's reasoning is clear, 423 U.S. at 351, 96 S. Ct. at 593, 46 L. Ed. 2d at 554, 44 USLW at 4090:

> There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdiction issues, [citation omitted], Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court. But we are not convinced that Congress ever intended to extend *carte blanche* authority to district courts to review the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

We have no case like *Thermtron* where the District Court remanded because of the crowded condition of its civil docket, a ground not provided for remand in § 1447(c). Without reaching or deciding whether remand was proper in the instant case, it is sufficient to say that the court clearly based the order of remand on grounds provided by the statute. In these circumstances, we have no jurisdiction to review the order and the petition for mandamus must be dismissed.

Id. at 1344. The remand order in *Dalrymple* is nonreviewable as Judge Holmes clearly based the remand on the lack of jurisdiction.

The case against GRDA is not a situation where there was an undisputed statutory basis for federal jurisdiction but there was a contractual forum selection clause at issue, a crowded docket or an abstention based remand. The federal district court did not have subject matter jurisdiction, and Judge Holmes so stated.

GRDA cites two cases for support that there is a conflict among the circuits regarding whether a determination that a defendant has not alleged a colorable immunity defense is reviewable on appeal. It first cites *Jamison v. Wiley*, 14 F.3d 222 (4th Cir. 1994). There is a key difference in that case from the present case. The Fourth Circuit summarized the law surrounding § 1447(d) as follows:

> Section 1447(c) mentions only two grounds for remand: a defect in removal procedure and a lack of subject matter jurisdiction in the federal court. *The order of remand in question here cannot fairly be characterized as one that was based on either of these grounds.*
>
> Neither the order of remand itself nor the accompanying memorandum opinion ever mentions § 1447(c) or its critical terms. Such a failure to specifically invoke the "magic words" of § 1447(c) is, of course, not fatal to application of § 1447(d) [citation omitted] . . .
>
> There is no evidence in the record to suggest that the district court based its decision to remand on a perceived defect in removal procedure, and Jamison does not contend that there is. What she does contend is that the district court based its order of remand on a perceived lack of subject matter jurisdiction, but we find no evidence of that either. Neither the April 30,

> 1992 order or the accompanying memorandum opinions ever mention either "jurisdiction" — or lack thereof — at all.

14 F.3d at 231-32 (emphasis added).

Clearly, Judge Holmes did make his order of remand based on lack of subject matter jurisdiction. He stated: (1) "The Court does not have jurisdiction pursuant to 28 U.S.C. § 1442;" and (2) "there is no basis for removal under Section 1441(b)."

GRDA also cites *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996) in support of its position that the order of remand in this case is subject to appellate review. The Fourth Circuit stated:

> If a review of the record discloses to a reviewing court's satisfaction that, notwithstanding any indications to the contrary, the actual basis upon which the court thought it was empowered to remand was neither of these [§ 1447(c)], § 1447(d) does not bar review. In the instant case, the only question is whether the basis actually invoked was lack of jurisdiction.
>
> My reading of the record here satisfies me that, despite evident confusion and some backing and filling during the process, the district court remanded in the end not on the assumption that there was a 'lack of jurisdiction' so that remand was *compelled*, but that though there was jurisdiction, there was discretion to remand. It is settled that when a district court remands on such a basis, § 1447(d) does not bar appellate review. [citations omitted].

77 F.3d at 1450-51 (emphasis original).

The Fourth Circuit summarized its conclusion as follows:

> [T]he court opined that with the case now involving only state law issues of claim and defense, these were *"better* left to a State tribunal", not that they *must* be remanded because of the court's lack of jurisdiction to determine them. In the face of this compelling evidence, the final citation to § 1447(c) can only be understood as simple inadvertence, and we certainly may do so.
>
> On this basis, I conclude the review of the remand order, because not actually based on either of the grounds specified in § 1447(c), is not barred by § 1447(d).

Id. at 1452-53 (emphasis original).

Therefore, for the issues in *Dalrymple,* there is no conflict among the circuits. When it is clear that the court is basing the remand on one of the elements in § 1447(c), such as lack of subject matter jurisdiction, § 1447(d) controls and there cannot be appellate review. It is unmistakable that Judge Holmes made a ruling that the federal district court did not have subject matter jurisdiction and that was the basis for the remand.

This Court has addressed the issue of review of a remand order from many different angles and consistently held there is no jurisdiction to do so under the circumstances in this case.

CONCLUSION

Judge Holmes remanded this case to state court for lack of subject matter jurisdiction. The Tenth Circuit properly held:

> Accordingly, we cannot see how the district court's remand orders could be characterized as based on anything but a lack of subject matter jurisdiction as contemplated by § 1447(c).

(Petitioner's App. 11).

GRDA has not cited a single case which supports its position that a case remanded for a reason set out in 28 U.S.C. § 1447(c) is reviewable in spite of 28 U.S.C. § 1447(d).

This is a simple straight forward matter upon which this Court has already given clear direction.

The petition for a writ of certiorari is totally without merit and should be denied.

Respectfully submitted,

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